

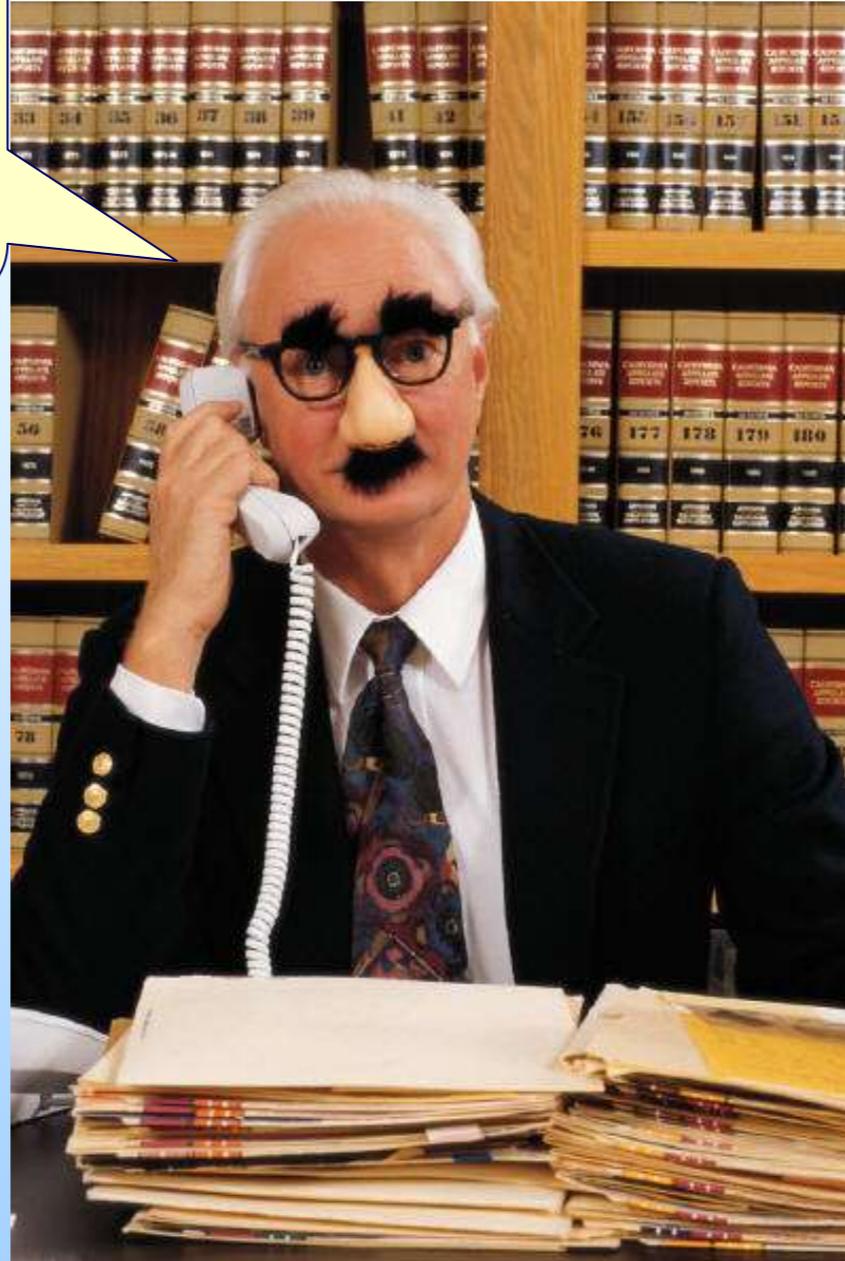
**National Institute of Corrections
Large Jail Network**

Legal Issues in Jails – 2013

William C. Collins, J.D.

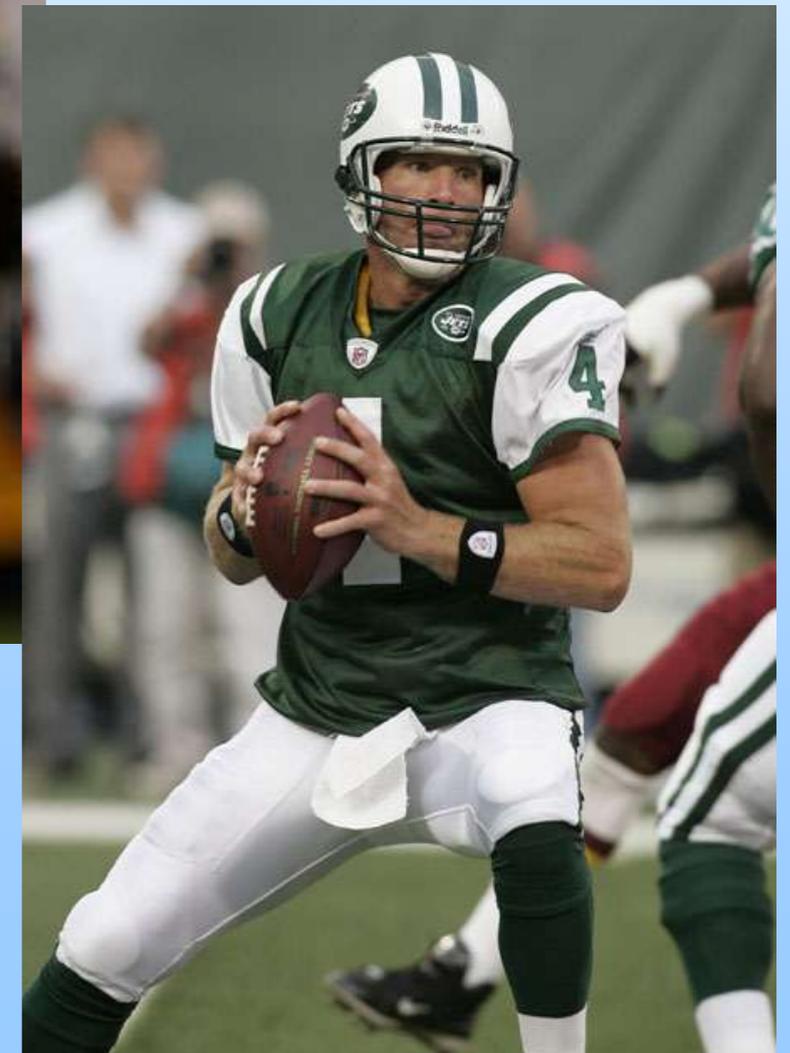
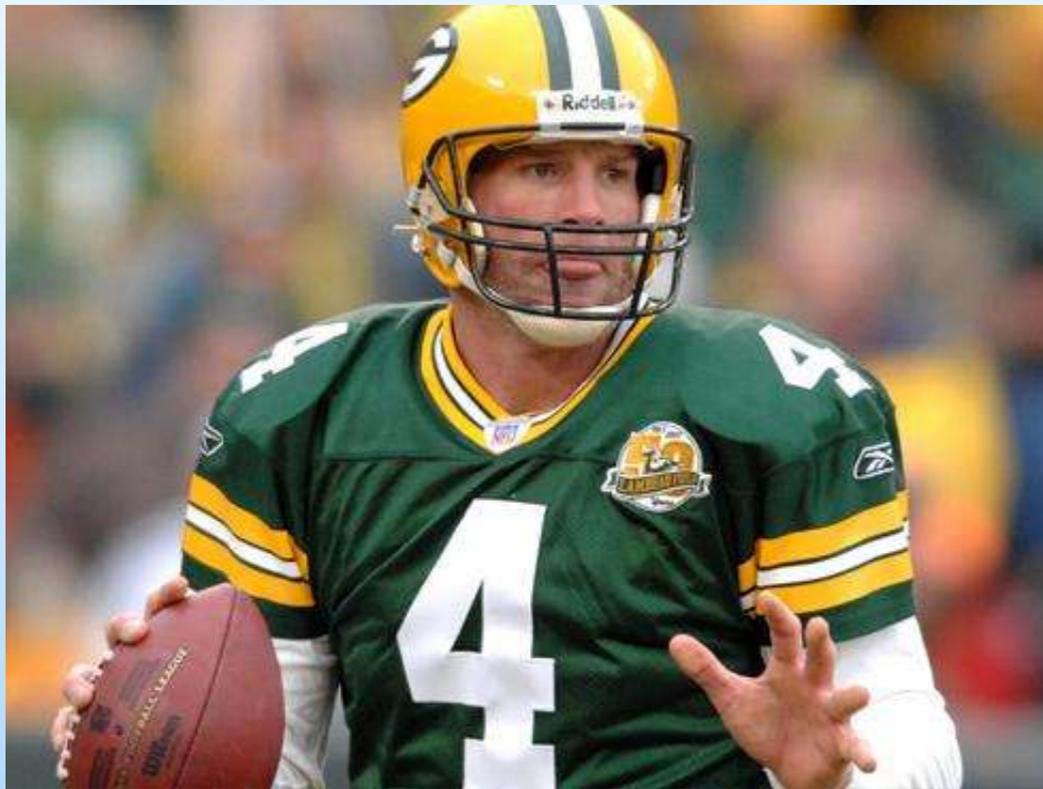
Presenter

After the #\$\$@!!*
strip search decision,
I ain't sayin' nothin'!



Bill Collins, J.D. (ret'd)

What, Me Retire?
If this guy can come back . . .



The Docket

Talking about religion

- Head Coverings
- RLUIPA, Diets, and Sincere Religious Beliefs

PREA Enforcement

Bits and Pieces

Stump the Chump

Some Religious Issues in Jails Staff and Inmate

Different legal theories, but with strong similarities

Employees: 1st Am't. and **Title VII**

Inmates: 1st Am't and **RLUIPA**

So, let's talk about head coverings and diets, but first, some background

Title VII - Overview

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . .; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion.

42 U.S.C. § 2000e-2(a)

The Title VII Tennis Match

When **Employee** shows

1. Sincere religious belief (head covering) that conflicts with job requirement (no head coverings or agency issue caps), +
2. She informed employer of the conflict, +
3. She was disciplined for violating agency rules. =

a “prima facie” case, which means that

The **Employer** must show *either* :

1. A good faith effort to accommodate the belief, OR
2. An accommodation would cause undue hardship on the employer/business

The Key Defense: “Undue Hardship”

One that results in more than a de minimis cost to the employer.

- “Cost” can be economic or non-economic

Safety and security: Very strong “undue hardship” factors

- Will reasonable safety/security concern *always* trump religious belief/practice?

Deference to officials’ judgment calls also important

Case Study

The Geo Case

- Female Muslim employees wore head scarves for years w/o problems.
- New warden arrives (from Cal prison) -- Only facility issued caps allowed.
- Employees eventually fired
- EEOC's expert: Jail's reasons meritless, no attempt to accommodate, no legit reason to ban scarves.
- Defendants: Scarf could: become choking weapon (see neckties), impede ID. Great burden in going thru checkpoints, all IMs have to be locked down, need "uniform" uniforms

EEOC v. Geo Group, 616 F3d 254 (3rd Cir 2010)

More on the Geo Case

COURT:

- A “close case”, but Jail wins, 2-1. Did deference tip the scale?
- Scarves could: be smuggling vehicle --- conceal identity --- be weapon. Threats to security = undue hardship

Other issues of note in *Geo*:

- A “uniform uniform” could be an undue hardship factor (but wasn’t in this case)
- Lack of documented problems not critical. Employer entitle to be pro-active.
- Deference

Other Employee Religious Issues: Skirts

Five year officer in juvenile facility. Became Pentecostal

- “Boss, my religion requires that I wear a skirt. May I?”
- “Yes.” (Then six months later:) “No.”
- “Please?”
- “No, sorry. . . . You’re fired.”

Undue hardships: Related to force incident. IM could pin skirt to floor, skirt would impede some force moves by officer.

- A “significant safety risk” = undue hardship.

Finnie v. Lee County, 907 F. Supp. 2d 750 (ND MS, 2012)

Finnie also endorses the “uniform uniform” principle

Inmate Claims and RLUIPA

No government shall impose a **substantial burden** on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that the imposition of the burden on that person

(1) is in **furtherance of a compelling governmental interest**; and

(2) is the **least restrictive means** of furthering that compelling governmental interest. 42 U.S.C. § 2000cc-1(a)

Kosher Diet Caselaw

The Rule is Getting Clearer

An inmate with a sincerely held religious belief is entitled to a kosher diet

- The die-hard argument: Kosher diets too expensive, create security problems
- Cases reject the cost/security arguments on facts of the case *Rich*, 716 F.3d 5254 (11th Cir., 2013), *Moussazaheh* 703 F.3d 781 (5th Cir., 2012):
- Cost/security argument increasingly hard to win.
 - *Rich*: After making the \$/security arguments, FL DOC agreed in separate DOJ suit to reinstitute Kosher diets system wide.

Same result likely with other religious diet claims

The remaining argument: is the inmate's belief sincerely held?

RLUIPA Detail

For his “prima facie” case, the inmate must show

1. Jail imposed a substantial burden on a . . .
2. Sincerely held religious belief / practice

Then, the jail must show

1. The restriction is furthers a “compelling governmental interest”
AND
2. Is the least restrictive way of doing so.

Let’s talk about “sincerely held beliefs”

The Inmate Must Show Sincerity (or) The Jail May Ask Questions

Further, prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion, **the Act does not preclude inquiry** into the sincerity of a prisoner's professed religiosity.

Cutter v. Wilkinson, 544 US 709, 733, n. 13 (2005)

Today's demand does not have to be answered tomorrow

The Rolling Stones Solution

("Time, time, time is on my side")

Delays in responding not necessarily RLUIPA violations

- Delay may not be "substantial burden"
- *Cutter* indicates evaluation of request appropriate

Possible Policy:

- Inmate wanting special diet must submit kite, stating why.
- Request evaluated - - - nature of request - - - sincerity
- Evaluation process should be timely (what is "timely?")

A guess: the request and evaluation period will avoid special diets for the short-term inmate

Suggestion: Diet variety may help. Pork free, veggie, etc.

Sincerity of Belief

Traps for the unwary: the inmate is insincere because:

- He was caught once with non-kosher food
- At booking, he said he was Catholic. Now he wants Kosher
- The Rabbi says “Jewish law says he cannot be Jewish, period.”
The mistake is focusing on religious orthodoxy, as opposed to sincerity:

RLUIPA doesn't care **WHAT** the inmate believes,
just that the belief is **SINCERE**

Sincerity: Usually a totality test

Rarely will a single factor determine sincerity. Usually a combination of factors

Credibility a key factor

Bad news: hard to decide sincerity in summary judgment. This means a trial may be necessary.

The Top Ten Insincerity List

(I'm not making this up)

10. Tenth jail booking. No prior Jewish indications
9. Demanded kosher only after finding hair in food
8. Provided no info about Jewish background
7. No evidence of practicing Judaism in community to support claim that he did
6. Had trouble spelling Torah and Israel
5. Interview w/ Rabbi showed little knowledge of Judaism
4. Ordered lots of non-kosher commissary
3. Attended no Jewish services or activities in jail
2. Spoke of Jewish issues in 3rd person ("the Jews...")

and the No. 1 reason for lack of sincerity . . .

The Call to MOM

Mahone: I want to file a lawsuit. They're denying me a religious diet . . .

Female: What kind you wanted?

Mahone: A Jewish diet.

Female: Why?

Mahone: Because it's, uh, part of my religion.

Female: Jewish?

Mahone: Well I really can't talk over the phone because they record it.

Female: Oh. Yeah.

Mahone: But, uh, one, uh, the other good reason is that, uh it's, it's pure, fresh.

It's not spit in and all that stuff like jail food is and stuff too.

Female: It's not what?

Mahone: It's not spit in, in, in...

Female: How you know?

Mahone: ...hair all over it and stuff like that. Because it comes from a, a place way out by the Jews and they make sure that their stuff is real...

Female: Kosher.

Mahone v. Pierce County, 2001 U.S. Dist. LEXIS 62589 (WD WA, 2011)

Questionable Sincerity

What things make you doubt sincerity?

Some Relevant (I think) Sincerity Factors

Remember, one factor, standing only probably isn't enough

- The sudden, dramatic change
- “Selective” practice
- The unique set of practices/beliefs (“My” religion)
- Inmate’s religious history -- consistent? Frequent changes?
- Ways he practices his new faith
- Interviews: what led you to this belief, etc.
- Knowledge of the professed faith
- One of a sudden flood of religious diet requests

The Interview?

Can a non-threatening interview by a knowledgeable religious leader shed light on sincerity?

- Not a “final exam”
- Look at the underpinnings of the belief/practice, e.g., “what is the religious significance of a Kosher diet?”
- How did you find this faith/belief?

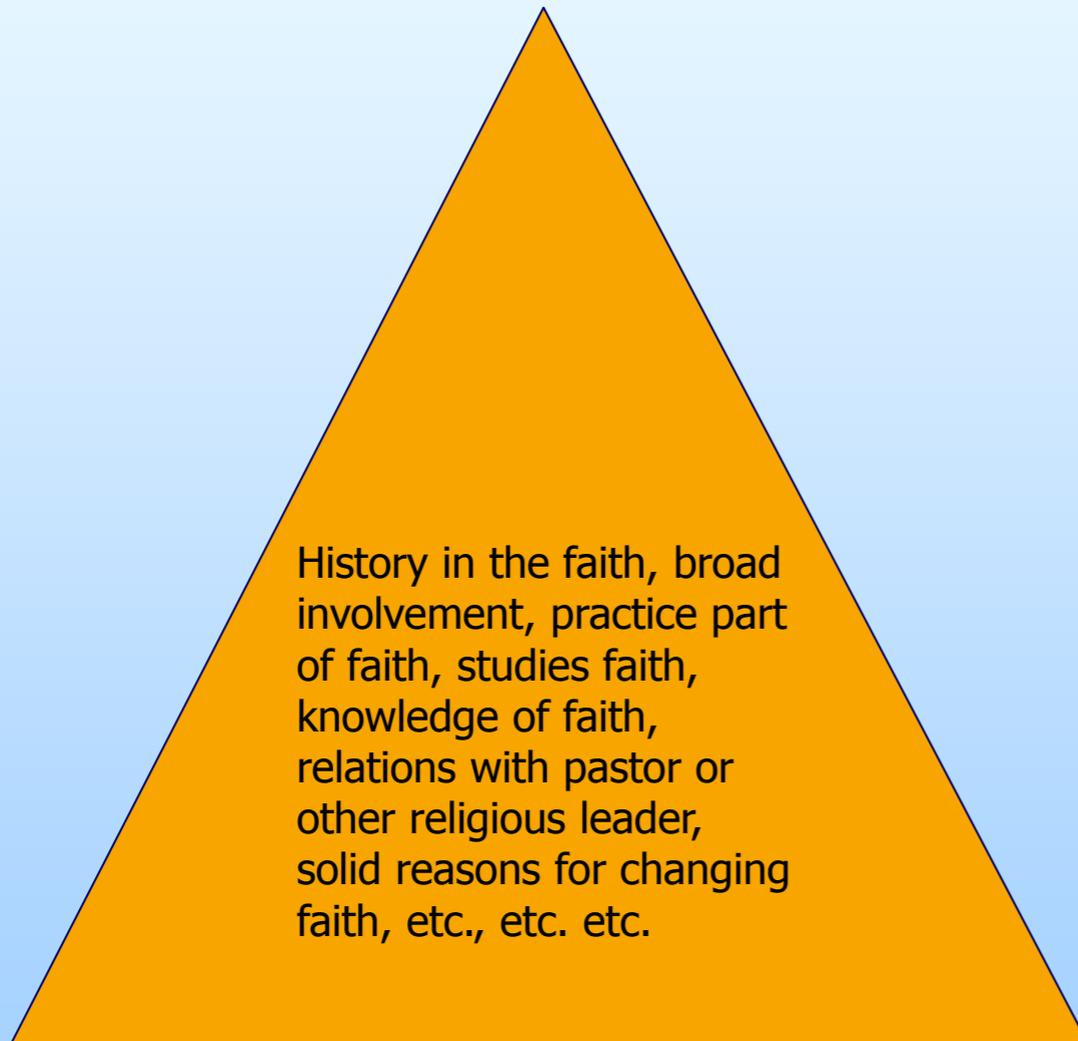
An interesting thought . . .

. . . the Court is troubled by the implication that a prisoner could create a self-serving set of beliefs, diligently attempt to adhere to them, and sue the prison which declines to permit him to do so for a violation of RLUIPA. Indeed, without a legal requirement that a prisoner's religious beliefs must be sanctioned by an outside governing body, the scope of religious affiliations for which prisoners might seek recognition is limited only by their imaginations. Without such a requirement, nothing prevents a prisoner from seeking recognition of a "religion" requiring consumption of certain desirable foods, or requiring access to the outdoors or to entertainment, or requiring social interaction with the opposite sex. More to the point, nothing prevents a prisoner from combining all faith-based systems into one "religion" and requesting access to the ceremonies, diets, holy days and faith items permitted by all. Surely RLUIPA was not intended to, and cannot, allow protection for "religions" that are based primarily on a desire to eliminate or significantly reduce the ordinary discomforts and restrictions of prison life. Attempts to game the system under the guise of RLUIPA should not be tolerated. [The opinion goes on to discuss that because these questions relate so much to inmate credibility, they "can rarely be determined on summary judgment." The case moved on to trial where sincerity would be an issue. [Vigil v. Colo. Dep't of Corr., 2012 U.S. Dist. LEXIS 20934, 32-34 \(D. Colo.2012\)](#)]

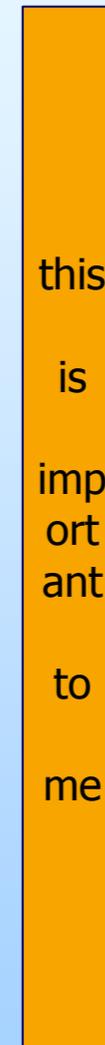
Can anything be made of this statement?

Who is more sincere ????

Inmate 1



Inmate 2



Does the narrow base suggest lack of sincerity?

Sincerity -- Final Thoughts

May be the main defense against many religious diet claims

Beware of the traps for the unwary

Good faith inquiry may postpone need for providing diet

May require going to trial

- Interview, good deposition of IM may allow SJ

Inmates and Head Coverings Another RLUIPA Application

Case 1: Kufis OK in cell or chapel, but prison headgear OK elsewhere

- HELD: No “substantial burden” where IM said his major concern was keeping his head covered
- Ct. also said rule justified by CGI: gang restriction, goal of uniform appearance *Jihad*, 2001 US Dist LEXIS 46930 (D. Minn 2011)

Case 2: Requiring IM to remove Kufi for inspection to and from religious service OK. *Garner*, 2011 U.S. Dist LEXIS 59546 (S.D. Tex., 2011)

With inmates, watch out for RLUIPA “least restrictive” prong. *Jihad* and *Garner* allowed IMs to wear Kufis some of the time

Bits and Pieces

Hair and the Lawyer

- Rastafarian, dreadlocks search, jury awards \$1.50. Guess the size of the attorneys' fee award *Sheperd* 662 F3d 603 (2d Cir 2011)

Tobacco

- Complete ban on tobacco violated RLUIPA rights of Lakota Sioux in South Dakota prisons
- Relief was very narrowly drawn

Native Am. Council of Tribes v. Weber,
897 F. Supp. 2d 828 (D.S.D. 2012)

“Psychogenic polydipsia” is . . .

- a. an imaginary mental illness
- b. hard to pronounce
- c. a medical symptom of various underlying diseases that is characterized by chronic excessive thirst which is quenched by the intake of an excess amount of water or any other fluid.
- d. Potentially life threatening

<http://www.primehealthchannel.com/polydipsia-definition-causes-symptoms-diagnosis-and-treatment.html>

“Psychogenic polydipsia” (2)

Rare, but associated with schizophrenia

Inmates have occasionally died from it

Potential alert to officers: excessive consumption of water may be a mental health **RED FLAG**

PREA

How many are actively into the PREA standards compliance process? Why?

- ? The law requires us to
- ? To avoid confrontation with the Feds
- ? Avoid PREA suits by inmates
- ? It's a good idea
- ? Other

Anyone had an audit yet? Can you share results?

If you fail your PREA audit, what are the consequences?

PREA

Inmates Cannot Sue for PREA Violations

Nothing in the PREA suggests that Congress intended to create a private right of action for inmates to sue prison officials for noncompliance with the Act. See Ball v. Beckworth, 2011 U.S. Dist. LEXIS 109529, (D. Mont. Aug. 31, 2011) (citing cases). "The PREA is intended to address the problem of rape in prison, authorizes grant money, and creates a commission to study the issue. . . . The statute does not grant prisoners any specific rights." Chinnici v. Edwards, 2008 U.S. Dist. LEXIS 119933, (D. Vt. 2008). Thus, Plaintiff fails to state a § 1983 claim based on an alleged violation of the PREA. Accord Rivera v. Drake, 2010 U.S. Dist. LEXIS 37933 (E.D. Wis.2010); Law v. Whitson, 2009 U.S. Dist. LEXIS 122791, (E.D. Cal. 2009); Inscoe v. Yates, 2009 U.S. Dist. LEXIS 92012, (E.D. Cal., 2009)

De'Lonta v. Clarke, 2013 U.S. Dist. LEXIS 5354 (W.D. Va. 2013)

PREA Enforcement: Not Your Usual Federal Regulation

Verify the following with agency counsel:

AG lacks the power to enforce PREA. 28 CLR Part 115, p. 7

“Enforcement” comes through limited loss of federal funding,
but...

The threat of funding loss extends only to facilities “under the
operational control of the State’s executive branch.”

28 CLR Part 115, p. 3, 17, Standards §115.501(b)

PREA and the carrot - stick analysis

What compels Jail PREA compliance?

- Federal enforcement action? No
 - Backdoor CRIPA action? Maybe
- Loss of federal funding? No
- Inmate lawsuit? No
- PREA a good idea? Selectively, yes
- Public relations? Maybe



It ain't over
'til it's over.

and it's over this time.

**I mean it. Read my lips. I promise.
(maybe.)**